BUKIT JONG QUARRY SDN BHD A

v.

DATO' TAN YUNN SIONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
AZIZAH NAWAWI JC
[SUIT NO: 22NCC-392-03-2012]
12 JUNE 2013

CIVIL PROCEDURE: *Striking out - Application for - Writ of summons and statement of claim - Whether plaintiff's solicitors lacked authority to act on behalf of plaintiff - Plaintiff's Directors' Circular Resolution authorising commencement of suit passed one year after issue of statement of claim - Whether resolution invalid* C

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Application to strike out writ and statement of claim - Opponent's failure to serve affidavit within 14 days - Whether contravened O. 32 r. 13(2)(b) Rules of Court 2012 - Whether affidavit excluded from consideration - Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* D E

The first defendant filed an application *vide* encl. 25 to strike out the writ of summons and the statement of claim ('SOC') filed by the plaintiff, essentially, for breach of fiduciary duties. The first defendant contended, *inter alia*, that: (i) the plaintiff's solicitors ('Messrs Syong Wee') lacked authority to act on behalf of the plaintiff when it filed the writ of summons and the SOC; (ii) the plaintiff's Board of Directors' Circular Resolution ('resolution') authorising Messrs Syong Wee to commence the suit was passed one year after the date of the issue of the SOC; and (iii) the plaintiff's resolution was invalid and had no effect as it was not signed by all the directors. The plaintiff submitted that by a circular resolution dated 20 May 2013, the authority of Messrs Syong Wee was further confirmed and ratified and that this circular was annexed to an affidavit. The first defendant, however, objected to the affidavit as it was filed out of time and contravened O. 32 r. 13(2)(b) of the Rules of Court 2012 ('ROC'). F G H

Held (allowing encl. 25 with costs): I

(1) The plaintiff's resolution was merely to confirm the appointment of Messrs Syong Wee as solicitors in the conduct of the present case and therefore, did not address on the

A authority to initiate the suit in the first place. Thus, it could not be said to be a valid ratification of the acts of Messrs Syong Wee in initiating the suit. The resolution also fell short of the requirements in *Danish Mercantile Co Ltd and Others v. Beaumont and Another* where (i) it did not state that the B company had approved the acts of initiating the suit; and (ii) it had instructed Messrs Syong Wee to continue with the action. (paras 15 & 17)

(2) It is crucial, for the purpose of rectification, that a Board C Resolution had resolved that the suit be initiated, in order to cloth the solicitor with the necessary authority to initiate the suit. However, there was none in the plaintiff's resolution. Hence, there was no rectification of the acts of Messrs Syong Wee in initiating the action by filing the suit on 21 March D 2012 and the suit must, therefore, be struck out for want of authority (*Hi-Summit Construction Sdn Bhd & Ors v. Konsortium Lapangan Terjaya Sdn Bhd & Ors;* refd). (para 18)

(3) Order 32 r. 13(2)(b) of the ROC provides that an affidavit in reply must be served within 14 days from the date the sealed E application and the affidavit in support were served on him. The plaintiff's affidavit was served two days out of time. Since the 14 days period in O. 32 r. 13(2)(b) is mandatory, the plaintiff's affidavit must be rejected and excluded from consideration (*Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai* F *Ong;* foll). (paras 19 & 20)

Case(s) referred to:

Danish Mercantile Co Ltd and Others v. Beaumont and Another [1951] 1 All ER 925 ***(foll)***

G *Hi-Summit Construction Sdn Bhd & Ors v. Konsortium Lapangan Terjaya Sdn Bhd & Ors [2011] 1 LNS 555 HC* ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(foll)***

Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***

H *Williams Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1991] 2 CLJ 1309; [1991] 1 CLJ (Rep) 492 SC* ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 32 r. 13(2)(b)

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For the plaintiff - Ben Chen (Lewis Lim with him); M/s Shyong Wee & Danny
For the 1st defendant - Tan Hock Chuan (Michelle Lai & Vincent Quek with him); M/s Tan Hock Chuan & Co
For the 2nd & 3rd defendants - YL Chong; M/s YL Chong & Assocs

Reported by Shah Saharudin

JUDGMENT

Azizah Nawawi JC:

Application

[1] This is an application filed by the first defendant to strike out the writ of summons (dated 21 March 2012) and the statement of claim (SOC) dated 20 March 2012 against the defendants on the following grounds:

(i) that the plaintiff's solicitors, Messrs Syong Wee & Donny ("SWD") lacked authority to act on behalf of the plaintiff when SWD filed the writ of summons and the SOC on 21 March 2012;

(ii) that the plaintiff's directors' circular resolution was passed one year after the date of the unauthorised issue of SOC. Thus, SWD lacked authority to act on behalf of the plaintiff when SWD commence this suit against the defendants; and

(iii) that the plaintiff's directors' circular resolution was invalid and has no effect as it was not signed by all the directors.

The Background Facts

[2] The SOC was filed by the plaintiff's solicitor, SWD on 21 March 2012. The plaintiff's claim is essentially for breach of fiduciary duties and in consequences thereof, for damages.

[3] By a letter dated 9 January 2013, counsel for the first defendant, Messrs Tan Hock Chuan & Co ('THC') wrote to SWD requesting for a copy of the plaintiff's board resolution authorizing SWD to commence this suit against the defendants (see exh. 'TYS-1A'). SWD did not reply.

[4] On 10 January 2013, during case management, the case was fixed for trial on 21 to 23 May 2013. Further directions on the conduct of the case were given by this court.

[5] THC wrote two other letters, dated 22 February 2013 and 11 March 2013, requesting for a copy of the plaintiff's board resolution authorizing SWD to commence this suit against the defendants. (see exhs. 'TYS-1B' and 'TYS-1C').

[6] In a letter dated 19 March 2013, SWD sent a copy of the plaintiff's Board of Directors' Circular Resolution dated 12 March 2013 (the BDRC dated 12 March 2013) to THC. The BDRC dated 12 March 2013 are marked as exhs. 'TYS-2' and "TYS-3" respectively.

[7] On 29 April 2013, the first defendant filed this application to strike out the plaintiff's SOC for want of authority.

[8] During case management on 16 May 2013, the court directed that this application in encl. (25) is fixed for hearing on 21 May 2013, as the case had already been set down for full trial on 21 May 2013. Enclosure (25) is to be heard before the trial itself.

[9] On 21 May 2013 the trial is set to proceed. However, counsel for the plaintiff applied for an adjournment as the plaintiff's main witness cannot attend court as his sister had just been admitted to hospital. On compassionate grounds, the trial was adjourned and was fixed for case management on 3 June 2013. The hearing of this application was also adjourned to 3 June 2013.

Submission Of Parties

[10] It is the submission of learned counsel for the first defendant that when SWD filed the writ of summons and the SOC on 21 March 2012, SWD was not authorised to by the plaintiff to commence this action against the defendants. The BDRC dated 12 March 2013 was only issued one year later, and this according to Dato' Tan Hock Chuan, amounts to a clear admission by the plaintiff that SWD had no authority to institute this action on 21 March 2012. On the issue of the proposed ratification pursuant to the BDRC dated 12 March 2013, the same is said to be insufficient

as the BDRC dated 12 March 2013 did not state that the plaintiff had approved the acts of SWD in filing the action in 21 March 2012 and that SWD is to continue with the action.

[11] The plaintiff however submits that the BDRC dated 12 March 2013 is sufficient to show the authority and ratification.

The Findings Of The Court

[12] The Supreme Court in *Williams Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor* [1991] 2 CLJ 1309; [1991] 1 CLJ (Rep) 492 held at p. 498:

> ... we would agree that a challenge to authority of solicitors may be made at any time and the action to be struck out is there was sufficient or admitted evidence that there is no action properly before it. But where there is no such evidence, the Court should only stay the proceedings and determine the issue of want of authority on the application of a party by motion or summons.

[13] In the present case, the first defendant had filed this application to strike out the writ and the SOC as the action was filed by plaintiff without authority. In *Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd* [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165; [1990] 3 MLJ 239, Justice VC George held that where the challenge had been made, "the burden of proving that the suit had been instituted with proper authority rest on the plaintiff's company".

[14] The plaintiff did not provide any evidence that the suit was initiated with the plaintiff's consent when it was filed on 21 March 2012. However the plaintiff exhibited BDRC dated 12 March 2013, which it says is the ratification of the actions of SWD. The BDRC dated 12 March 2013 reads as follows:

Bukit Jong Quarry Sdn Bhd
(Company No. 167940 - V)
(Incorporated in Malaysia)

Directors' Circular Resolution Made In Pursuant To The Company's Article Of Association

Resolved:

Appointment Of Legal Advisers

THAT authority be and is hereby given to confirm the appointment of Messrs SHYONG WEE & DANNY, Advocates

A and Solicitors of 568-10-9, 10th Floor, Kompleks Mutiara, 3 ½ Miles Jalan Ipoh, 51200 Kuala Lumpur as the solicitors in the conduct of the following litigation matter -

Writ Saman No.	:	22NCC-392-03/2012
B Plaintiff	:	Bukit Jong Quarry Sdn Bhd
Defendant	:	Dato Tan Yunn Siong May binti Soluman Mohd Isam bin Ngah

C Signatures Of All Directors Approving The Above:

.....	.....
Dato Chang Jong Yu	Capt(r) Adbul Ghani Bin Wahab

D .....
Mohd Faizal bin Ramli

Dated: 12 Mac 2013.

[15] I am of the considered opinion however that the said BDRC E dated 12 March 2013 is merely to confirm the appointment of SWD as the solicitors in the conduct of the present case. The BDRC dated 12 March 2013 did not address on the authority to initiate the suit in the first place. As such, it cannot be said to be a valid ratification of the acts of SWD in initiating this suit in F 2012. In *Danish Mercantile Co Ltd and Others v. Beaumont and Another* [1951] 1 All ER 925, CA Jenkins LJ said at p. 930:

> I think the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether G he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there, the action is not properly instituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to H ratify the act of the solicitor who started the action, to adopt the proceedings and say: "I approve of all that has been done in the past and I instruct you to continue the action." When that has been done, the, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no I

longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority.

[16] Applying the principle in *Danish Mercantile Co Ltd* (*supra*), to ratify the act of a solicitor who had initiated the suit without authority, the resolution of the board must state that the company:

(i) approved all that had been done by the solicitor in the past; and

(ii) instructs the solicitor to continue the action.

[17] The BDRC dated 12 March 2013 does not contain these words. Learned counsel for the plaintiff submitted that this court should look at the effect of resolution, which is to confirm the appointment of the solicitors in the conduct of the litigation, and this amounts to a rectification. However, I agree with the submission of the first defendant that the BDRC dated 12 March 2013 fell short of the requirements of a rectification in *Danish Mercantile Co Ltd* (*supra*). The BDRC dated 12 March 2013 did not state that the company had approved of acts of initiating the suit and further instructs SWD to continue with the action.

[18] Indeed the High Court in *Hi-Summit Construction Sdn Bhd & Ors v. Konsortium Lapangan Terjaya Sdn Bhd & Ors* [2011] 1 LNS 555; [2011] MLJU 693 held that it is crucial for the purpose of a rectification, that a board resolution had resolved that the suit be initiated, in order to cloth the solicitor with the necessary authority to initiate the suit. As there is none in the BDRC dated 12 March 2013, I am of the considered opinion that there is no rectification of the acts of SWD in initiating this action by filing this suit on 21 March 2012. This suit must therefore be struck out for want of authority.

[19] However, the plaintiff further submitted that by a circular resolution dated 20 May 2013, the authority of SWD was further confirmed and ratified. The circular resolution was annexed to an affidavit affirmed by Dato' Chang Jong Yu on 29 May 2013. This affidavit was strenuously objected to by the first defendant, as the same was filed out of time and contravenes O. 32 r. 13(2)(b) of

A the Rules of Court 2012. Order 32 r. 13(2)(b) provides that an affidavit in reply must be served within 14 days from the date the sealed application and the affidavit in support were served on him.

[20] The unsealed copy of encl. (25) and the affidavit in support
B was served on the plaintiff on 29 April 2013. The sealed copy of encl. (25) was served on 13 May 2013, and the last day of the 14 days period falls on 27 May 2013. But Dato' Chang Jong Yu affidavit (for/on behalf of the plaintiff) was only served on 29 May 2013, which was two days out of time. There was no formal
C application to extend the 14 days period, nor was there an explanation for the delay. In the circumstances, I am bound by the decision of the Court of Appeal in *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321; [1996] 3 MLJ 85 which held that the 14 days period in O. 32 r. 13(2)(b) is
D mandatory, and therefore that affidavit of Dato' Chang Jong Yu affirmed on 29 May 2013 must be rejected and excluded from the consideration of this court for the purposes of this application.

[21] For the reasons enumerated above, encl. (25) is allowed with
E costs of RM5,000. The writ and SOC is hereby struck out.

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